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No. 90-1191

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,
vs.
WEISS BROS. CONSTRUCTION CO. DBA WEISSCAL, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CARPENTERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE FUND FOR SOUTHERN CALIFORNIA
BY
GERALD V. SELVO
DECARLO, CONNOR & SELVO
A Professional Corporation
500 So. Virgil Avenue
Suite 320
Los Angeles, CA 90020-9990
(213) 738-7959

Bowne of Los Angeles, Law Printers (213) 627-2200

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On Petition for Writ of Certiorari to the Court of Appeal of the State of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Carpenters Joint Apprenticeship and Training Committee Fund for Southern California ("Fund") hereby moves the Court for leave to file an *amicus curiae* brief in support of Petitioner's Petition for a writ of certiorari in this matter. Fund has requested consent of all respondents to file this *amicus* brief. Petitioners have consented.

Respondents have informed Fund that they are willing to consent to the filing of only one *amicus* brief supporting the petition. Numerous amici wish to file briefs in support of the petition. Accordingly, Fund files this Motion.

This Motion is based upon the facts and legal conclusions of the underlying case. The decision that is the subject of the petitioned-for writ ruled that the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 et seq., preempted Petitioner's contract action against the respondent contractor and associated persons and entities. One petitioner is, like Fund, a Taft-Hartley trust fund financing apprenticeship benefits. The other is a related joint apprenticeship committee. Respondent Weisscal is a contractor who was performing "public works" for the State of California. California Labor Code Section 1777.5 required Respondent to provide apprenticeship training on the one project involved. Weisscal entered into an agreement with Petitioners to this end, through a form provided by California, known as a DAS-7. This form contractually bound Weisscal to comply with Petitioner's general financing and training requirements.

When Weisscal failed to comply with its contractual contribution and training obligation Petitioners filed a contractual action in state court seeking to collect contractual liquidated damages or "pay-in-lieu", and unpaid contributions. The court sustained Weisscal's demurrer to the complaint on the basis that ERISA completely preempted the Petitioners' causes of action.

Movant Fund operates under California Labor Code Section 1777.5 and the court's decision has significant consequences for the Fund itself and the employers, labor organizations and joint labor-management organizations affiliated with the Fund. These entities are obliged to and

do provide financing and training for carpenter craft apprentices over the entire Southern California area.

BRIEF OF CARPENTERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE FUND AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

AMICUS AND ITS INTEREST

Carpenters Joint Apprenticeship and Training Committee Fund for Southern California ("Fund") is an express trust fund subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"), established and existing for the purpose of receiving contributions, holding them in trust, and paying the expenses of a carpenter craft apprenticeship training program in eleven Southern California counties, i.e., Los Angeles, Orange, San Bernardino, Riverside, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, Inyo, and Mono. The Fund is constituted pursuant to Section 302(c)(6) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c)(6), and is commonly referred to as a Taft-Hartley Trust. Representatives of the Carpenters' Union sit as labor Trustees on the Fund, as well as an equal number of management Trustees. The Fund actually provides and pays for classrooms and certain other training provided to carpenter craft apprentices in the eleven Southern California counties involved. The fund operates in conjunction with the Carpenters Joint Apprenticeship Trust Committee ("Committee"), the body charged under California Labor Code § 1777.5 with approving public works contractor applications to train carpenter craft apprentices in its geographic areas, arranging for the dispatch of same, and

administering Carpenter Apprentice Standards. Under § 1777.5 the contractor contributes to the Fund "in the same amount or upon the same basis and in the same manner as the other contractors do", or makes payments to the California Apprenticeship Council ("CAC"), a state apprenticeship agency constituted in compliance with federal apprenticeship law.

The court below has dismissed as ERISA preempted an action undertaken by a similar "Fund" and a Training Committee ("Committee") to recover liquidated damages, "pay-in-lieu" and/or delinquent apprenticeship contributions from a contractor that had executed a training agreement with the Committee pursuant to California Labor Code § 1777.5. The Fund's interest in this proceeding is in part financial — the loss of contributions from employers who obtain apprentices from the associated Committee and who pay the Fund for the costs of their formal training by virtue of the state laws involved in this case. Employers who are *not* signatory to collective bargaining agreements with the Carpenters' Union or to subscription agreements with the Fund pay into the Fund pursuant to these state laws.

In addition, the Fund desires a settled delineation of the scope and extent of preemption of the state apprenticeship laws that are, by virtue of the Fitzgerald Act, 29 U.S.C. § 50, et seq., a primary reason for the Fund's existence. Brief of *amicus curiae* is desirable in this matter because the scope of ERISA preemption of state apprenticeship laws and enforcement mechanisms is largely undetermined and is of critical importance to every state apprenticeship agency and ERISA apprenticeship fund, as well as to the United States Bureau of Apprenticeship Standards, the federal agency that approves state apprenticeship programs.

ERISA preemption of state public works "fair labor" laws is a developing area of critical financial and practical importance to multiple entities and persons, both private and public. The decision below is also significant to the larger question of ERISA preemption of state laws in general, the subject of many recent Supreme Court decisions.

II.

ARGUMENT

A. THE COURT SHOULD ISSUE *CERTIORARI* IN THIS CASE IN ORDER TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW, A QUESTION UPON WHICH THE UNITED STATES CIRCUIT COURTS OF APPEAL HAVE DIFFERED

The Court should issue *certiorari* in this case because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. That question is whether "apprenticeship standards" are ERISA plans vis-a-vis an employer compelled by state prevailing wage law to comply with them on discrete state public works projects. Both the California Supreme Court and the court in *Hydrostorage v. Northern California Boilermakers,* 891 F.2d 719 (9th Cir. 1989), *cert. denied,* ____ U.S. ____, 111 S. Ct. 403, 112 L. Ed. 2d 46 (1990), the linchpin of the decision here, have reached their decision on this question in a way that conflicts with the decisions of various United States Circuit Courts of Appeal, including the Ninth Circuit itself. A difference in opinion exists between the Fifth Circuit and the Seventh, the Ninth and the Eleventh concerning the fundamental question of what action by an

individual employer is required to create an ERISA plan as to that employer.

B. THE CASE INVOLVES THE FUNDAMENTAL AND IMPORTANT QUESTION OF THE CIRCUMSTANCES UNDER WHICH ERISA COVERAGE ATTACHES TO A RELATIONSHIP BETWEEN AN EMPLOYER AND AN INDEPENDENTLY EXISTING ERISA PLAN

The decision in this case has important consequences for not only California's public work's prevailing wage law, but for similar prevailing wage laws in as many as 28 other states operating under the National Apprenticeship Act, 29 U.S.C. § 50.

Case law discloses that an employer's intention to assume responsibility, as revealed by all relevant surrounding circumstances, determines whether that employer has so associated itself with an existing ERISA plan that the relationship between the plan and the employer is governed by ERISA. The fundamental question is whether the employer has evidenced an intent to indefinitely continue providing ERISA-covered benefits. Absent an express statement otherwise, the employer's lack of involvement either directly or indirectly in the ownership, control, or administration of the plan indicates that the employer has not assumed the responsibility for continuing ERISA covered benefits, and the association is not one governed by ERISA.

The Court of Appeals and the *Hydrostorage* court neither considered nor applied applicable guiding principles developed in the most analogous line of cases; those involving multiple employer trusts providing welfare benefits of a type covered by ERISA.

Plaintiffs in this case did not pursue defendant under Erisa, but rather under state law. They have never sought in any fashion to subject defendant to any of the strictures of ERISA. Defendant never complied in any significant way with the obligations imposed by state law, and certainly never undertook any effort to comply with ERISA as to its relationship with the plaintiffs and the apprenticeship program in general. Defendant is not trying to protect from complicating and restrictive state regulation a program of benefits that it has established or maintained for the good of its employees. Rather, defendant is trying to invalidate a contract that it entered into with the state and plaintiffs that was wholly beneficial to its employees, the industry, the state, and, under the Fitzgerald Act, the United States. These circumstances call for application of ERISA's public policy against permitting purely commercial interests to exploit its preemption provisions solely for personal economic gain.

C. THE COURT OF APPEALS UNCRITICALLY APPLIED THE *HYDROSTORAGE* DECISION TO THIS CASE

The court of Appeals characterized this case as possessing "great similarity" to *Hydrostorage* in that "Both cases involve the attempt to enforce section 1777.5 and bind a non-signatory employer to the terms of a collectively bargaining apprenticeship trust fund and standards covered by ERISA". *Operating Engineers Apprentice Training Fund v. Weisscal,* 221 Cal.App.3d 867, 879, 270 Cal.Rptr. 786, 993 (1990). The court in fact did little more than recount almost verbatim the *Hydrostorage* decision.

A key element of the court's decision is its application of the *Hydrostorage* determination that the apprenticeship "standards" involved in *Hydrostorage* were an ERSIA

plan.[1] While the *Hydrostorage* court engaged in some factual analysis of the standards, unlike the Appellate Court here, it did not analyze the relationship of the involved employer to those standards in a sufficiently substantive manner for ERISA purposes.

The *Hydrostorage* court's determination that the involved apprentice standards were an ERISA plan was absolutely critical to the disposition of that case. The district court had not decided that the standards were an ERISA plan. Rather it decided only that the "Apprenticeship Program" was such a plan, without specifying what it meant by that term. 891 F.2d at 727. The circuit court decision on the standards was *de novo.*

Because § 1777.5 compels a contractor to comply with applicable apprenticeship standards, both the *Hydrostorage* court and the Appellate Court concluded that it compelled participation in an ERISA "plan". Committee does not take issue with the proposition that ERISA preempts a state law that compels participation in an ERISA plan. Committee argues that the apprenticeship standards here and in *Hydrostorage* are not ERISA plans

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[1]The instant case was decided on a demurrer to the complaint, and the *Hydrostorage* decision did not issue until briefing had concluded. Weisscal called the case to the attention of the court and the parties filed supplemental briefs on *Hydrostorage's* "analytical impact". *Weisscal,* 221 Cal.App.3d at 873, 270 Cal.Rptr. at 789. Unlike the *Hydrostorage* court, the Court of Appeals did not review in detail or at all the apprenticeship standards actually involved in this case. These standards were not presented in their entirety to the trial court until after the demurrer was sustained, in a motion for reconsideration. While both excerpts from and the complete Standards were contained in the record on appeal, nothing in the opinion indicates that the Court of Appeals actually reviewed the Standards or the extent to which they were incorporated by reference in the DAS-7 agreement.

vis-a-vis the involved employers, and that "apprenticeship standards" are not per se ERISA plans for all those who have a relationship with them, as the Appellate Court necessarily held in this case.

D. WHETHER "APPRENTICESHIP STANDARDS" CONSTITUTE AN ERISA PLAN IS A FACTUAL QUESTION THAT CAN BE RESOLVED ONLY BY A REVIEW OF ALL RELEVANT FACTS RESPECTING THE PARTICULAR EMPLOYER INVOLVED

The existence of an ERISA plan is a question of fact to be answered in light of all the surrounding circumstances from the point of view of a reasonable person. *Kanne v. Connecticut General Life Insurance Co.*, 859 F.2d 96, (9th Cir. 1989), citing *Credit Managers Association v. Kennesaw Life & Accident Insurance Co,* 809 F.2d 617, 625 (9th Cir. 1987).

In *Credit Managers,* a case involving insurance policies and an association of unrelated employers, the court reversed entry of a summary judgement determination that ERISA plans were not involved because of the existence of factual questions with respect to the individual employers. In *Kanne* the existence of language within the plan documents stating that it was an ERISA plan was a relevant factor.

E. COMPLIANCE WITH APPRENTICESHIP STANDARDS PURSUANT TO CALIFORNIA LABOR CODE SECTION 1777.5 DOES NOT CREATE A COMPULSORY ERISA PLAN RELATIONSHIP FOR THE INVOLVED EMPLOYER

1. The Court of Appeals Applied ERISA's Definitions Selectively.

The *Hydrostorage* court (and the Court of Appeals by outright adoption) utilized a very literal, definitional type approach in deciding that the Apprenticeship Standards were an ERISA plan. They treated the question as a unitary one not dependent upon the relationship of the particular employer to the standards. In doing so, however, they omitted and ignored critical language from the relevant ERISA definitions and caselaw.

The *Hydrostorage* court quoted part of ERISA's definition of an employee welfare benefit plan in its analysis of why the Standards were a plan. 891 F.2d at 727. It omitted the words 'to the extent that such plan fund or program was established or is maintained [to provide benefits for participants or their beneficiaries]".

While the court determined that the Standards were established by the Committee and that the Committee was "an employer or . . . employee organization, or . . . both", it did not examine ERISA's definition of employer and how that definition limits the definition of an employee welfare benefit plan.

Under ERISA an employer is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan . . .". ERISA Section 3(5), 29 U.S.C. § 1003(5). Since the definition of employee welfare benefit plan incorporates the definition of employer, the terms "acting

. . . in relation to" limit not only the definition of an ERISA employer, but also the definition of a welfare plan.

To paraphrase ERISA's definitions then, an employer is an employer with respect to what is in general an ERISA plan only if it acts directly or indirectly as an employer in relation to the plan, by establishing or maintaining it.

2. Multiple Employer Trust Cases Establish That Intent Is The Touchstone For Determining Whether Subscribing Employers Have Created An ERISA Plan.

What qualifies as acting in relation to a plan? It is not enough that an ERISA plan is "establish[ed] or maintain[ed]" by some unrelated party for those verbs are themselves contained in the definition of plans, and the terms "acting in relation to" would be redundant. ERISA is a "reticulated" statute, and none of its provisions have thus far been determined to be redundant, though not a model of legislative drafting.

Committee submits that the answer lies, at least partly, in the intention of the specific employer involved. This is one of the "surrounding circumstances" that must be reviewed to determine whether an ERISA plan is involved, vis-a-vis the specific employer.

This issue has been intensively addressed in the context of cases involving health insurance obtained through "multiple employer" trusts, and the Department of Labor has issued regulations concerning same. *See* 29 C.F.R. 2510.3-1(j). These cases provide useful guidance because they involve employers who "subscribe to" an arrangement with an outsider that is in the business of providing ERISA-type benefits. Unlike this case, however, the employers in multiple employer trust cases are not under a

direct legal compulsion to subscribe. As a result, their action in "voluntarily" subscribing tends to indicate more of a "commitment" to providing such benefits on a continuing basis than does mere compliance with a law requiring subscription as to a discrete prevailing wage project. *See generally, Fort Halifax Packing Company v. Coyne,* 482 U.S. 1 (1987).

Perhaps the seminal case in the multiple employer trust area is *Taggart Corp. v. Life and Health Benefits Administration, Inc.,* 617 F.2d 1208 (5th Cir. 1980), *cert. denied sub nom. Taggart Corp. v. Efros,* 450 U.S. 1030 (1981). In *Taggart* the court found that neither a trust providing group insurance to small employers nor an individual employer's subscription to that insurance constituted a "plan, fund, or program" within the meaning of ERISA, because the employer "neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits". *Taggart,* 617 F.2d at 1211. The court referred to the history, structure and purposes of ERISA to reject the Secretary of Labor's assertion that an individual employer's naked act of subscribing to the trust was itself the creation of a plan. Such trusts do not provide benefits gratuitously, of course, so employers must make payments to such trusts. The courts have not viewed such payments as per se establishing or maintaining an ERISA plan, however.

Taggart was followed by *Donovan v. Dillingham,* 668 F.2d 1169 (11th Cir. 1982), *modified en banc,* 688 F.2d 1367 (11th Cir. 1982). The Eleventh Circuit was created out of the Fifth and the *Dillingham* court initially held that the *Taggart* decision was controlling precedent. In its *en banc* decision, however, the court reversed itself, partially adopted the Secretary's theory, and limited *Taggart.* However, the court did not agree with the Secretary's

contention that "establishing" a plan meant nothing more than an ultimate decision by an employer to provide a benefit covered by ERISA. *Dillingham,* 688 F.2d at 1372.

Dillingham makes clear that the relationship of the individual employer to what is in general an ERISA plan is critical. The court did not determine "how many subscribers established or maintained plans". It specifically noted that it was not clear from the record that all subscribers had established an employee benefit plan. *Dillingham,* 688 F.2d at 1374 & n.15.

In section III of its *en banc* opinion the *Dillingham* court recounted numerous facts indicating that many of the subscriber employers, employee organizations, or both, were "committed to providing benefits to employees or members . . . on a continuing basis", and "anticipated continuing furnishing of such benefits". 688 F.2d at 1374. The court thereby placed great emphasis on the intention of the subscribing party. *Accord, Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.,* 805 F.2d 732 (7th Cir. 1986), *Credit Managers Association v. Kennesaw Life and Accident Insurance Co.,* 809 F.2d 617 (9th Cir. 1987).

As for structural elements, the *Dillingham* court held that a plan is established under ERISA if from the surrounding circumstances a reasonable person could ascertain the intended benefits, a class of beneficiaries, the source of the financing, and procedures for receiving benefits. 688 F.2d at 1372-73. While these structural elements are necessary for a plan to exist, they are not sufficient, for the commitment to provide the benefits on a continuing basis must also exist.

One court has harmonized *Taggart* and *Dillingham* by observing that *Taggart,* like *Dillingham,* in fact requires that the employer intend to guarantee continuation of the

benefits. *Turnbow v. Pacific Mutual Insurance Co.*, 765 P.2d 1160 (Nev. Sup. Ct. 1988). The employer here obviously had no intent to continue or guarantee any apprenticeship benefit beyond the one specific public works job involved.

In both *Taggart* and *Dillingham* the defendants were seeking to avoid ERISA coverage. The *Dillingham* court applied ERISA's purpose to "protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans" to find the arrangements there within ERISA's scope. *Dillingham, supra,* 688 F.2d at 1370.

In *Matthew 25 Ministries, Inc. v. Corcoran,* 771 F.2d 21 (2d Cir. 1985), Matthew failed in its attempt to gain ERISA coverage in order to avoid regulation by New York State. The court closely examined ERISA's definitions, in the same manner as the *Hydrostorage* court. Matthew claimed it was an "employer" within the meaning of ERISA, as an "association of employers" acting "in the interest of an employer . . . in relation to an employee benefit plan". The court held that this wasn't enough, that Matthew first had to show that its trust was "established or maintained" by its individual employer members. The court made this statement even though the subscribing employers were paying Matthew for providing benefits. It held that Matthew had failed to "disclose what role, if any, its mixed-bag group of enrollees plays in the management of its trust", and therefore failed to show that it was covered by ERISA. *Matthew,* 771 F.2d 22. The court cited *Taggart* for this proposition, among other cases. The evident policy advanced in *Matthew* was to prevent what are functionally insurance companies from escaping state insurance regulation by simply marketing their product

as an ERISA plan through a "multiple employer trust" arrangement.

Wisconsin Education Association Insurance Trust v. Iowa State Board of Public Education, 804 F.2d 1059 (8th Cir. 1986), supports the view that ERISA does not govern the relationship between Weisscal and the Apprenticeship Standards here. The court in *Wisconsin*, relying on ERISA's definitions, found no ERISA coverage because the solely-union sponsored Trust covered employees that were not members of the union, even though it provided coverage only to employees of school districts having collective bargaining agreements with a union sponsor of the Trust.

The situation here is similar because Weisscal is not a "union employer" and its employees in general are not union members, although particular apprentices who might be dispatched might be. Rather than finding that the union-management sponsored plan in this case is not in general an ERISA plan, it is far more reasonable to determine that neither it nor the apprentice standards themselves are an ERISA plan vis-a-vis Weisscal.

III.

CONCLUSION

The Court should review this case to establish a uniform approach towards ERISA coverage and preemption in "subscription" situations. The state interests involved are substantial and worthy of protection as furthering explicit federal policy under the Fitzgerald Act. Employer intention to create or maintain a plan in subscription situations, as disclosed by all surrounding circumstances should be the touchstone for ERISA coverage and preemption. The limited and circumscribed subscription to apprenticeship standards that occurred here due solely to state law does not disclose the requisite employer intention. ERISA coverage and preemption should not be found in these circumstances.

Dated: February 20, 1991

Respectfully submitted,

DE CARLO, CONNOR & SELVO
A Professional Corporation

By: _____

Gerald V. Selvo
Attorneys for Carpenters Joint Apprenticeship and Training Committee Fund for Southern California